IN THE

Supreme Court of the United States

October Term, 1963

No. 971

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Petitioner,

v.

AMERICAN OIL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

We would like, at the outset, to comment briefly on Respondent's contention that this Court lacks jurisdiction because the petition for certiorari was served by first class mail, rather than by air mail as required by Rule 33 of the Rules of this Court. We intended to serve the petition by Air Mail, and certified to the Court that it had been so sent. If, through a clerical error, insufficient postage was affixed, we apologize to the Court. As far as Respondent is concerned, however, the error was harmless, since the petition was mailed on Friday, April 3, and received the following business day, Monday, April 6. Moreover, the time to file an opposing brief runs from the date the petition is received by Respondent. Rule 24.

As to Respondent's argument on the merits, little is required in the way of a reply. Perhaps it might be helpful to the Court, however, if we commented briefly on each of the six factors advanced by Respondent on pages 9 and 10 of its brief as grounds for justifying a different result in the

present case than was reached by this Court in *American Manufacturing* and *Warrior & Gulf*.

> "1. The arbitration clause in the agreement under consideration herein states that arbitration will be 'limited to' certain designated matters."

The arbitration clause is limited in precisely the same manner in which the arbitration clauses involved in *American Manufacturing* and *Warrior & Gulf* were limited. Although the agreement in this case contains a grievance procedure which permits the processing of all "questions upon which employees covered by this Agreement desire consideration," arbitration is "limited" to "alleged violations of the terms of this agreement" or "alleged noncompliance with past policies, practices, customs or usages" (as well as certain other matters not here relevant). The agreement in *Warrior & Gulf* had a similarly broad grievance procedure coupled with a similarly limited arbitration provision; the agreement in *American Manufacturing* limited both the grievance procedure and arbitration to questions concerning the application and interpretation of the agreement.

Prior to 1950, as Respondent states (Br. p. 5), the parties had an arbitration provision as broad as the present grievance procedure (J. A. 39). It provided for arbitration not only of questions arising under the agreement, but also of "questions pertaining to rates of pay, wages, hours of employment, or other conditions of employment *not covered by the contract.*" (J. A. 39, emphasis added). Under that provision, the union would have had the right to arbitrate a claim or request which is based neither on the agreement or past practice. For example, it could have processed through arbitration a claim that management's decision to contract out certain work was simply unfair. Such a claim can be processed as a grievance under the present agreement, but it would not be subject to arbitration.

But in this case, as in *American Manufacturing* and *War-*

rior & Gulf, the union's claim is not that management has acted unfairly, but that it has acted in violation of the agreement and past practice. That is precisely the kind of claim which is subject to arbitration under the "limited" arbitration clause involved here, just as similar claims were held arbitrable by this Court under similarly "limited" arbitration provisions in *American Manufacturing* and *Warrior & Gulf*.

> "2. The arbitration clause in the agreement under consideration herein contained a specific exclusion clause (Subsection D) which provided expressly that the Company would bargain with the Union on matters not covered in the agreement, but that the Company retained the right to refuse to arbitrate such matters and provided that the Union had the right to strike on such issues when the Company declined to arbitrate."

When the parties agreed to limit their previously all-inclusive arbitration clause to questions arising under the agreement, they also adopted Subsection D, which provides that the company need not arbitrate matters "not covered in the agreement," but that the union shall have the right to strike over such matters. This provision simply excludes from arbitration any union claim or request which is *not* based on the agreement, and gives the union the right to strike over such a claim or request. The grievance in this case, however, claims that the company has violated the agreement. The merits of that claim, of course, are for the arbitrator, but whatever its merits the claim is plainly one which is "covered in the agreement."

> "3. The collective bargaining agreement does not contain an absolute no-strike clause, and, therefore, petitioner had a right to strike when respondent refused to arbitrate the issue of contracting out work."

It is true that the agreement in this case does not contain

an absolute no strike clause. It does not follow, however, that the union had the right to strike over the grievance in this case. The agreement preserves the right to strike only with respect to matters "not covered in this Agreement," and, as indicated above, the union in this case is claiming rights *under* the agreement. It is not at all clear that the union would have the right to strike over such a claim. The agreement seems to contemplate that arbitration would be the sole remedy for alleged violations of the agreement.

Moreover, as we pointed out in the petition, the court below did not rely on the absence of an absolute no-strike clause as a basis for its decision. If it had, this would be an additional ground for granting certiorari, since the decision would then be in direct conflict with the decisions of three other Circuits (see cases cited in Pet. p. 14) as well as the concurring opinion in *American Manufacturing* and *Warrior & Gulf* (363 U. S. at 564). However, since the court below did not rely on this argument, it is totally lacking in support, as well as logic, and therefore deserving of no consideration by this Court.

> "4. The collective bargaining agreement contains no reference whatever to the contracting out of work or the arbitration of the Company's right to contract out work; and since the exclusion clause specifically includes items not covered in the agreement, this issue is expressly within the exclusion clause."

The agreement in *Warrior & Gulf*, of course, also contained no express reference to contracting out of work. Indeed, the whole point of the *Warrior & Gulf* opinion is that collective bargaining agreements necessarily cover many matters, such as contracting-out, which are not expressly mentioned but which nevertheless are subject to arbitration. This Court expressly recognized that "contracting out work is the basis of many grievances" under agreements which

have no express reference to contracting out. 363 U. S. at 584 and n. 8.

And as we have already stated, above, the "exclusion" clause in the agreement in the present case simply excludes from arbitration union claims which are *not* based on the agreement; it has no application to the grievance in this case, which *is* based on the agreement.

> "5. The bargaining history between the parties establishes a limitation of the scope of the arbitration clause by the Company during negotiations (over the strenuous objection of the Union); and also establishes a bargaining history of unsuccessful attempts by the Union to limit the right of the Company to contract out work."

As we have indicated, the parties once had an arbitration clause which permitted arbitration not only of questions arising under the agreement, but also of "questions pertaining to rates of pay, wages, hours of employment, or other conditions of employment *not covered by the contract.*" (J. A. 39, emphasis added). The fact that the agreement no longer permits arbitration of matters outside the agreement does not, of course, affect the union's right to arbitrate alleged violations of the agreement or past practice, which are expressly made arbitrable under the terms of the current agreement.

The union's unsuccessful efforts in the past to obtain express contractual restrictions on the company's right to contract out work are irrelevant to the arbitrability of the grievance in this case, just as the similar bargaining history in *Warrior & Gulf* was irrelevant to the arbitrability of the grievance in that case. Such bargaining history would only be relevant to the argument on the merits before the arbitrator.

> "6. The arbitration clause in the instant case had previously been construed by the Court of Appeals, and

the Court of Appeals had previously held that the Company had not agreed to arbitrate its right to contract out work."

This argument was fully dealt with in the petition, and no further reply is required here. It should be noted, however, that prior to this Court's decision in *American Manufacturing* and *Warrior & Gulf*, a number of federal courts had misconstrued arbitration clauses in collective bargaining agreements. If the Company's argument in this case were correct, it would mean that such erroneous decisions would be forever binding on the parties involved, even in cases involving different grievances under different contracts, despite the fact that the decisions are inconsistent with the subsequent decisions of this Court. As we demonstrated in our petition, the law of collateral estoppel does not require such an unjust and anomalous result.

Respectfully submitted,

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